Volume 85
Issue 2 *Dickinson Law Review - Volume 85, 1980-1981*

1-1-1981

Recent Cases

CRIMINAL PROCEDURE—Miranda Interrogations—Interrogation Defined as Express Questioning or Its Functional Equivalent. *Rhode Island v. Innis,* 100 S. Ct. 1682 (1980).

In *Rhode Island v. Innis,* [1] a divided[2] United States Supreme Court concluded that the procedural safeguards outlined in *Miranda v. Arizona*[3] must be adhered to "whenever a person in custody is subjected to either express questioning or its functional equivalent."[4] Finding that respondent Innis had not been subjected to express questioning or its functional equivalent,[5] the Court held that a violation of his *Miranda* rights[6] had not occurred.[7] In reaching its decision, the Court addressed for the first time[8] the precise meaning of "interrogation" for purposes of *Miranda.*[9]

On January 17, 1975, respondent was arrested at approximately 4:30 a.m. for the armed robbery of a cab driver which had occurred earlier that evening, and for the robbery and murder of a cab driver

---

1. 100 S. Ct. 1682 (1980).

2. Justice Stewart delivered the opinion of the Court, and was joined by Justices Blackmun, Powell, and Rehnquist. Chief Justice Burger and Justice White filed brief concurring opinions. Justice Marshall filed a dissenting opinion in which Justice Brennan joined. Justice Stevens filed a lengthy dissenting opinion.

3. 384 U.S. 436 (1966). *Miranda* indicated that unless other fully effective means could be devised to inform an accused of his right to remain silent and to assure a continuous opportunity to exercise it, the following procedural safeguards must be employed prior to any questioning:

> [T]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45.

4. 100 S. Ct. at 1689.

5. *Id.* at 1690. The Court recognized that Innis had, in fact, been subjected to subtle compulsion, but it refused to equate such treatment with the term "interrogation." *Id.* at 1691.

6. 384 U.S. 436 (1966). The main thrust of the *Miranda* decision was an attempt to safeguard the fifth amendment privilege against compelled self-incrimination. The Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444.

7. 100 S. Ct. at 1691.

8. *Id.* at 1687. Although the Court had previously undertaken to determine whether interrogation existed for purposes of *Miranda,* the decision in *Innis* represents its initial attempt to specifically define the term. *See* note 62 *infra.*

9. 384 U.S. 436 (1966).

which had occurred a few days before.[10] Captain Leyden, who was in charge of the investigation, subsequently advised respondent of his *Miranda* rights.[11] Respondent indicated that he understood those rights and that he wanted to see an attorney.[12] Shortly thereafter, the captain assigned three officers to transport and accompany respondent to police headquarters. Captain Leyden specifically instructed the officers not to question, intimidate, or coerce respondent in any way.[13]

While enroute to the station, the officers did not directly question respondent. Two officers, however, did engage in a conversation among themselves concerning the inability of the police to find the gun used in the recent murder.[14] One officer expressed concern that a young girl from a nearby school for handicapped children might find the weapon and injure herself, the other officer echoing his concern.[15] Upon hearing this, respondent interrupted the conversation and requested the officers to turn the car around so that he could show them where the gun was hidden.[16] The police once again warned Innis of his constitutional rights,[17] after which respondent led them to the location of the murder weapon.[18]

The trial court sustained the admissibility of the weapon and the testimony related to its discovery over the objections of respondent.[19] The court did not address whether Innis had, in fact, been interrogated by the officers, and concluded that his decision to inform the police of the location of the gun acted as a waiver of his right to remain silent.[20] On appeal, the Rhode Island Supreme

---

10. Record at 302-4. The police were looking for Innis because he had been identified from a wanted poster by the cab driver robbed earlier that evening. *Id.*

11. *Id.* at 337. Respondent had previously received the required warnings from two additional patrolmen, and apparently had not conversed with either of them. *Id.* at 305, 311.

12. According to the procedural safeguards provided by *Miranda,* all questioning must cease when a suspect indicates that he wishes to consult with an attorney before speaking. *See* note 3 *supra.*

13. Captain Leyden did not mention this instruction in his testimony, and only one of the officers in the car testified that such an instruction had been given. *Id.* at 337.

14. It is undisputed that everyone in the vehicle, including respondent, heard the officers' conversation. 100 S. Ct. at 1686 n.1.

15. Although the exact words spoken by the officers are unclear, according to Officer Williams' best recollection, the conversation proceeded verbatim as follows:

Gleckman: It would be too bad if a little girl would pick up the gun, and maybe kill herself.

McKenna: Gee, it would be too bad.

Record at 374.

16. *Id.* at 351.

17. *Id.* at 337.

18. *Id.* at 338.

19. Innis asserted that the introduction into evidence of the murder weapon, as well as the testimony of the police officers relating to its discovery, violated his fifth amendment right against self-incrimination. __ R.I. __, __, 391 A.2d 1158, 1160 (1978).

20. The trial judge found that respondent had been repeatedly and completely advised of his *Miranda* rights, and that he had intelligently waived his right to remain silent. 100 S. Ct. at 1687.

Court set aside respondent's conviction,[21] indicating that both the gun and respondent's statements should have been suppressed.[22] The court held that the officers' remarks in the car constituted interrogation,[23] and that Innis had not waived his *Miranda* rights by speaking to the police.[24] The United States Supreme Court subsequently granted certiorari[25] in order to address for the first time the meaning of "interrogation" for purposes of *Miranda v. Arizona,*[26] and to determine whether Innis was, in fact, subjected to such "interrogation."

Miranda held that since custodial interrogation[27] is inherently coercive,[28] certain procedural safeguards must be employed[29] prior to the initiation of any such action by the police.[30] Recognition of this inherent coerciveness, however, has existed for many years.[31] The Court has long been of the opinion that confessions or statements obtained through physical brutality[32] or resulting from psychological coercion[33] are the products of improper exercises of authority and, therefore, are not admissible as evidence at trial.

Prior to 1964, a "voluntariness"[34] or "totality of the circum-

---

21. The jury had convicted respondent of first degree felony murder, kidnapping, and robbery. All the charges related to the incident involving the murdered cab driver.

22. __ R.I. __, 391 A.2d 1158 (1978).

23. Even though the officers' remarks were neither directed at respondent nor made with the intention of eliciting incriminating evidence from him, the court concluded that Innis had been subjected to "subtle coercion" that, for purposes of *Miranda,* was the equivalent of interrogation. __ R.I. at __, 391 A.2d at 1162.

24. The court recognized that respondent had previously asserted his right to counsel, and concluded that such conduct would be inconsistent with a finding that he subsequently waived his *Miranda* rights. *Id.* at __, 391 A.2d at 1163. *See also* State v. Lachapelle, 112 R.I. 105, 111, 308 A.2d 467, 470 (1973).

25. Rhode Island v. Innis, 440 U.S. 934 (1979).

26. 384 U.S. 436 (1966).

27. The *Miranda* Court speaks in terms of "custodial interrogation", indicating that two requirements must be met before an individual is afforded the protection offered by *Miranda*: first, the individual must be *in custody,* or otherwise deprived of his freedom of action; and, second, the individual must be *interrogated. Id.* at 444.

28. The Court indicated tht custodial interrogation "carries its own badge of intimidation," *id.* at 467, and "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

29. *See* note 3 *supra.*

30. 384 U.S. at 445-58.

31. The use of unethical, improper, and inherently coercive interrogation techniques by police to obtain information from individuals suspected of crime has been a highly controversial topic, at least since the Wickersham Commission report on police abuses was submitted in 1931. IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931). *See* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 101.

32. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 446-47 n.7 (1966); White v. Texas, 310 U.S. 530 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

33. *See, e.g.,* Leyra v. Denno, 347 U.S. 556 (1954); Chambers v. Florida, 309 U.S. 227 (1940).

34. *See* Stone, *supra* note 31, at 102-03.

stances"[35] test was employed by the Court in order to protect an accused from improper police interrogation. Statements that appeared to have been involuntarily obtained, in light of the totality of the surrounding circumstances,[36] were held inadmissible at trial. Because of the vagueness of the term "voluntary" and the Court's resultant inability to precisely define its parameters,[37] the sixth amendment guarantee of the right to counsel[38] soon replaced the "voluntariness" test as the device utilized to control unscrupulous police interrogation.[39] The sixth amendment was found to exclude any incriminating statements elicited from the accused after indictment and in the absence of counsel.[40] The emphasis of the Court, however, shifted[41] from the sixth amendment to the fifth amendment when certiorari was granted in *Miranda v. Arizona* in order "to explore some facets of . . . applying the privilege againt self-incrimintion to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[42]

The rigidity of the rules adopted in *Miranda* and the clear, concrete guidelines that they give law enforcement agencies[43] continue to be the foremost attributes of the decision.[44] Nevertheless, the applicability of the *Miranda* rules depends upon two factors—custody

35. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Spano v. N.Y., 360 U.S. 315, 321 n.2 (1959) (citing 28 cases); Harryman v. Estelle, 616 F.2d 870, 873 (5th Cir. 1980).

36. In applying the "totality of the circumstances" or "voluntariness" test, the major factors taken into consideration by the Court included (but were not limited to) the characteristics of the accused, *see, e.g.,* Lynum v. Illinois, 372 U.S. 528 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960), and the details of the interrogation, *see, e.g.,* Rogers v. Richmond, 365 U.S. 534 (1961); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

37. *See, e.g.,* C. MCCORMICK & J. WIGMORE, THE LAW OF EVIDENCE §§ 149-50 (2d ed. 1972); *Developments in the Law—Confessions,* 79 HARV. L. REV. 935, 961-84 (1966); Kamisar, *What Is an "Involuntary" Confession?,* 17 RUTGERS L. REV. 728 (1963).

38. U.S. CONST. amend. VI.

39. Massiah v. United States, 377 U.S. 201 (1964). *See also* Brewer v. Williams, 430 U.S. 387 (1977) (on facts very similar to *Innis,* the Court based its opinion on the sixth amendment right to counsel).

40. *Id.* at 204-05. *Massiah* indicated that the sixth amendment guarantee of the right to counsel required the exclusion of incriminating information deliberately elicited from an individual in the absence of counsel *after he had been indicted. Id.* Since the majority of police interrogations occur *prior to* indictment, *Massiah,* itself did not provide a great deal of protection for interrogation victims. *See* Stone, *supra* note 31, at 103.

Subsequent Court decisions had a tendency to increase the scope of *Massiah. See, e.g.,* Escobedo v. Illinois, 378 U.S. 478 (1964) (extending *Massiah's* sixth amendment protection to include pre-indictment interrogation). Nevertheless, these extensions eventually led to such confusion and uncertainty that the Court became dissatisfied with the sixth amendment's protection against unscrupulous police interrogation. *See* Stone, *supra* note 31, at 103.

41. *See* note 40 *supra.*

42. 384 U.S. 436, 441-42 (1966).

43. *See* note 3 *supra.*

44. *E.g.,* Miranda v. Arizona, 384 U.S. at 479. *See also* Fare v. Michael C., 439 U.S. 1310, 1314 (1978) (holding that the rigidity of *Miranda* affords police and courts clear guidance on the manner in which to conduct a custodial interrogation). The current attitude of the Court reflects a reluctance to extend *Miranda* or to extend its strictures on law enforcement agencies, as recent decisions have evidenced an effort to limit *Miranda's* provisions to the express terms and logic of the original opinion. *Id.* at 1314-15. *But see* Stone, *supra* note 31, at 100 (indicating that *Miranda* has fallen into disfavor with the majority of the Court).

and interrogation.[45] "Because the custody issue has arisen more frequently and has generally been regarded as a more difficult one, a good deal more attention has been paid to what constitutes *custodial* interrogation than to what constitutes custodial *interrogation.*"[46] The Supreme Court recognized that *Innis* represented its first attempt to precisely define the term "interrogation" as it is used in *Miranda.*[47]

Eighty-three years ago in *Bram v. United States,*[48] the Court recognized that an individual can be interrogated without direct questioning by the police. Although the *Miranda* Court makes repeated reference to "questioning,"[49] it is evident that the Court intended custodial interrogation to encompass varieties of "questionless" interrogation as well.[50] *Innis* likewise indicates that *Miranda* was not designed to merely protect individuals from direct questioning.[51] *Miranda* was concerned with the evils inherent in the "interrogation environment,"[52] and with minimizing the pressure, tension, and anxiety experienced by one subjected thereto.[53] Thus, pressure

---

45. *See* note 27 and accompanying text *supra.*

46. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?,* 67 GEO. L.J. 1, 14 n.85 (1978).

47. *See* note 8 and accompanying text *supra.*

48. 168 U.S. 532 (1897) (the only party who asked a question was Bram himself).

49. 384 U.S. 436 (1966). *E.g.,* the Court indicates that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers." *Id.* at 444 (emphasis added).

Subsequent cases have also supported the view that questioning is an integral part of interrogation under *Miranda. See, e.g.,* Orozco v. Texas, 394 U.S. 324 (1969) (questioning taking place in suspect's home after he had been arrested); Mathis v. United States, 391 U.S. 1 (1968) (questioning taking place in a prison during suspect's term of imprisonment).

50. The *Miranda* Court discussed at length the various tactics and techniques employed by law enforcement agents in attempting to intrrogate suspects. 384 U.S. at 448-55. Reference was made to interrogation techniques such as minimizing the moral seriousness of the offense and casting blame on the victim or on society. *Id.* at 450. The Court likewise recognized strategies that do not require verbal statements by the interrogators, such as the "false line-up" and the "reverse line-up." *Id.* at 453. For a comprehensive discussion of the various interrogation techniques employed by police officers, see F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967).

For cases indicating that interrogation is not limited to express questioning, see, e.g., Brewer v. Williams, 430 U.S. 387 (1977); Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980); Henry v. United States, 590 F.2d 544 (4th Cir. 1978); United States v. Anderson, 523 F.2d 1192 (5th Cir. 1975); Eben v. State, 599 P.2d 700 (Alaska 1979); People v. Sanders, 55 Ill. App. 3d 178, 370 N.E.2d 1213 (1977); Ochoa v. State, 573 S.W.2d 796 (Tex. Ct. Crim. App. 1978); State v. Boggs, 16 Wash. App. 682, 559 P.2d 11 (1977).

51. 100 S. Ct. at 1688. Although *Miranda* provides protection from express questioning by police, its safeguards do not apply to words or actions normally attendant to arrest and custody. *Id.* at 1689. *Accord,* Vines v. State, 285 Md. 369, 374, 402 A.2d 900, 904 (1979) (*Miranda* does not apply to administrative questioning such as the routine questions asked of all arrestees who are booked or otherwise processed); Kamisar, *supra* note 46, at 7 n.41.

52. 100 S. Ct. at 1688. The "interrogation environment" referred to in *Innis* is created by the interplay of interrogation and custody. Neither custody nor interrogation alone results in the type of coercive atmosphere that *Miranda* was designed to guard against. Thus, " 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 1689. *See also* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions,* 17 AM. CRIM. L. REV. 1, 46 (1979).

53. The *Miranda* rules were intended to reinforce the nervous or ignorant suspect, negat-

or compulsion must exist in order for a suspect to validly claim a violation of his fifth amendment privilege against *compelled* self-incrimination, regardless of the form of interrogation.[54]

The *Innis* Court found such compulsion to exist whenever a person in custody is subjected to either express questioning or its functional equivalent.[55] Since respondent had not been subjected to express questioning,[56] the issue presented[57] was whether he had been subjected to the Court's so-called functional equivalent of questioning.

The Court concluded that Innis had not been subjected to the functional equivalent of questioning and, thus, had not been interrogated for purposes of *Miranda*.[58] "Functional equivalent" was construed to be words or actions "that the police should know are reasonably likely to elicit an incriminating response from the suspect."[59] Attention is to be focused primarily upon the suspect's perception of the situation, rather than upon the intent of the police.[60] In essence, *Innis* refuses to label any police activity as interrogation unless it is foreseeable that such conduct will elicit an incriminating response from the suspect.[61]

---

ing all pressure above and beyond that inherent in arrest and detention itself. Kamisar, *supra* note 46, at 18.

54. U.S. CONST. amend V. Although the fifth amendment is often referred to as providing a privilege against self-incrimination, the privilege is actually against *compelled* self-incrimination. *See id.*; H. FRIENDLY, *A Postscript on Miranda,* BENCHMARKS 266, 271 (1967). *See also* United States v. Washington, 431 U.S. 181, 187 (1977); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam); Anderson v. Maryland, 427 U.S. 463 (1976); United States v. Mandujano, 425 U.S. 564 (1976); Fisher v. United States, 425 U.S. 391 (1976); United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

A number of post-*Miranda* cases, however, have held incriminating statements inadmissible absent a finding of the compulsion normally associated with coercive interrogation. *See, e.g.,* Orozco v. Texas, 493 U.S. 324 (1969) (defendant was asked questions in his own bedroom without *Miranda* warnings); Mathis v. Texas, 391 U.S. 1 (1968) (defendant interviewed by federal revenue agent in a state prison without *Miranda* warnings).

55. 100 S. Ct. at 1689.

56. *Id.* at 1690.

57. The question of custody does not present itself in the *Innis* case. It is undisputed that respondent was in custody while being transported to the police station. *Id.* at 1688.

58. *See* note 5 *supra.* The Court did not discuss the issue of whether respondent waived his *Miranda* rights by speaking out to the police. They indicated that since respondent was not interrogated for *Miranda* purposes, there existed no reason to reach a conclusion on the waiver issue. *Id.* at 1688 n.2.

Since the *Innis* Court did not address the issue of waiver, the scope of the discussion will not be expanded to encompass the questions raised by it. Of interest, however, is the analysis presented by Professor Joseph D. Grano, indicating that if interrogation was found to have existed, the alleged waiver would have presented no issue whatsoever. Grano points out that the alleged waiver *followed* the interrogation, and thus, would have had no effect. *See* Grano, *supra* note 52.

59. 100 S. Ct. at 1689. The Court defined "incriminating evidence" as any statement that the prosecution may later seek to introduce at trial. *Id.* n.5.

60. *Id.* at 1690. Although the Court feels that the perceptions of the suspect should be afforded the greatest weight in determining whether "question-less" interrogation existed, it clearly stated that the subjective intent of the officer is also a relevant factor. *Id.* n.7.

61. Words or actions by police constitute interrogation only if the officers *should have known* that they were *reasonably likely* to evoke an incriminating response from the suspect.

The *Innis* standard does not represent a total departure from prior cases seeking to determine whether interrogation existed,[62] or from prior definitions of the term.[63] On the contrary, *Innis* develops a meaning for interrogation that incorporates the factors deemed relevant by these earlier decisions.[64] Factors such as the officer's intent

---

Id. at 1690. Knowledge by the police of an unusual susceptibility of the suspect to a particular type of persuasion will be an important factor in determining the officer's ability to foresee the consequences of his conduct. *Id.* at 1690 n.8. *See also* Brewer v. Williams, 430 U.S. 387 (1977) (use of psychology on suspect known to be a deeply religious escapee from a mental institution; F. INBAU, *supra* note 50, at 60-62 (various interrogation techniques and tactics, including appeals to suspect's conscience, honor, or sense of decency).

62. For cases determining that there was interrogation within the meaning of *Miranda*, see, e.g., Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980) (officer asked a question out of suddent shock and surprise); Henry v. United States, 590 F.2d 544 (4th Cir. 1978) (defendant made incriminating statements to his cellmate, a paid government informant); Combs v. Wingo, 465 F.2d 96 (6th Cir. 1972) (reading ballistics report to defendant); Jones v. State, 346 So.2d 639 (Fla. App. 1977) (oral review of evidence to defendant); People v. Sanders, 55 Ill. App. 3d 178, 370 N.E.2d 1213 (1977) (defendant told that co-defendant made a statement and that case is strong); State v. Godfrey, 131 N.J. Super. 168, 329 A.2d 75 (1974) (statement to defendant: "You're a liar. You were there. You did it. You did it."); Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973) (reading statement of a third party that implicated defendant); Commonwealth v. Simala, 434 Pa. 219, 252 A.2d 575 (1969) (defendant told: "You look kind of down in the dumps . . . if you want to talk, talk."); State v. Boggs, 16 Wash. App. 682, 559 P.2d 11 (1977) (questions in the course of "casual conversation").

For cases holding that there was not interrogation within the meaning of *Miranda,* see, e.g., United States v. Carpenter, 611 F.2d 113 (5th Cir. 1980), *cert. denied,* 100 S. Ct. 3013 (1980) (conversation between police officers as to "everyday matters"); Stanley v. Wainwright, 604 F.2d 379 (5th Cir. 1979) (defendants placed in police vehicle with an activated tape recorder); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), *cert. denied as to co-defendant,* 429 U.S. 1099 (1977) (question regarding location of kidnap victim); United States v. Davis, 527 F.2d 1110 (9th Cir. 1975), *cert. denied,* 425 U.S. 953 (1976) (defendant shown photograph of himself in bank during course of robbery); Haire v. Sarver, 437 F.2d 1262 (8th Cir. 1971) (defendant's wife asked a question while in presence of defendant); People v. Webb, 243 Cal. App. 2d 179, 52 Cal. Rptr. 85 (1966) (question inviting explanation of reason for being in house with $200,000 worth of stolen furs); Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970) (defendant told that witness had identified him, but they would like to hear his side of the story); Owens v. Commonwealth, 218 Va. 69, 235 S.E.2d 331 (1977) (officer told defendant he knew he had committed the crime, and "it takes a man to tell the truth").

63. Prior definitions of interrogation have indicated that the inquiry should focus upon whether the officer's conduct *could reasonably have had the force of a question* on the accused, Harryman v. Estelle, 616 F.2d 870, 874 (5th Cir. 1980), and whether the conduct was *calculated to, expected to,* or *likely to* elicit incriminating information. Eben v. State, 599 P.2d 700, 708 n.21 (Alaska 1979). According to Professor Welsh S. White, the test for determining the existence of interrogation should involve an *objective, reasonable-man* standard. White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel,* 17 AM. CRIM. L. REV. 53, 67 (1979). The court should attempt to determine whether the officer's conduct or speech was of the type that would be likely to induce an average person situated in the suspect's position to believe he was being subjected to interrogation. *Id.*

Similarly, Professor Yale Kamisar focuses on the likelihood that police conduct will elicit an incriminating response. Kamisar, *supra* note 46, at 9. Kamisar plays down the relevance of the officer's intent or purpose. *See* notes 64-66 and accompanying text *infra.*

64. An analysis of prior cases and commentary reveals that three major factors are considered to be relevant in determining the existence or nonexistence of interrogation.

The first factor is the *intent or purpose of the interrogating officer.* If the officer intended his words or actions to have the effect of a question and, hopefully, to elicit an incriminating response from the suspect, the officer's conduct will generally be considered as interrogation. *See, e.g.,* Brewer v. Williams, 430 U.S. 387 (1977); Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980); Combs v. Wingo, 465 F.2d 96 (6th Cir. 1972); Haire v. Sarver, 437 F.2d 1262 (8th Cir. 1971); Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971). *See also* Grano, *supra* note 52, at 39; Kamisar, *supra* note 46, at 14; White, *supra* note 63, at 62-63.

The second factor is the *suspect's perception* of the situation. If the suspect felt compelled

to elicit an incriminating response, the suspect's perception of the officer's words or actions, and the reasonable-man's perception of the situation,[65] play an important role in determining whether an interrogation existed for purposes of *Miranda*. Therefore, all three factors should be given due consideration.[66]

Justice Marshall, joined by Justice Brennan, expressed agreement with the definition offered by the majority.[67] Justice Marshall stated that the Court has required "an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect."[68] Nevertheless, he refused to recognize that interrogation did not exist in this particular case.[69] Although the Court concluded that Innis was merely subjected to subtle compulsion,[70] Marshall viewed the police conduct as an extremely strong appeal to the conscience[71] of the suspect, bearing close resemblance to a classic interrogation technique.[72]

Justice Stevens likewise felt that interrogation had occurred in the *Innis* case, perceiving the definition offered by the Court to be much too narrow.[73] He declared that *Miranda's* protection was designed to extend to any interrogation, not merely to an interrogation that is reasonably likely to be successful.[74] According to Justice Stevens, police actions or statements must be deemed interrogation if a reasonable person in the suspect's position would perceive them as calling for a response.[75]

---

to speak as a result of the officer's words or actions, the officer's conduct may be found to constitute interrogation. *See, e.g.,* Kamisar, *supra* note 46, at 51; White, *supra* note 63, at 62.

The last factor is the *objective, reasonable man's* perception of the situation. If the officer's words or actions would be considered by a reasonable man as likely to elicit an incriminating response from the suspect, such conduct will be deemed interrogation. *See, e.g.,* Grano, *supra* note 52, at 39; Kamisar, *supra* note 46, at 9; White, *supra* note 63, at 62-63.

65. *See* note 64 *supra.*

66. A number of courts and authors appear to afford greatest weight to the first of these criteria—the intent or purpose of the officer. *See, e.g.,* note 64 *supra. But see* White, *supra* note 63, at 66-67 (preferring an objective, reasonable man standard over one focusing on an individual's subjective beliefs or intentions).

67. 100 S. Ct. at 1692.

68. *Id.*

69. *Id.*

70. *See* note 5 *supra.*

71. 100 S. Ct. at 1692.

72. *Id.* For a comprehensive discussion on interrogation techniques, see F. INBAU, *supra* note 50.

73. 100 S. Ct. at 1694.

74. *Id.* n.5. Justice Stevens noted that the Court's definition of interrogation contains a loophole because some statements of a suspect will not be recognized as the product of interrogation even though the statements were *deliberately elicited* by the police. He envisions this possibility when the police, without any reason to believe their efforts will be successful, deliberately attempt to elicit information in hope that the suspect may nevertheless respond. *Id.* at 1695 n.8.

75. *Id.* at 1694. Justice Stevens' definition of interrogation includes any police conduct that has the same purpose or effect as a direct question. *Id.* at 1695. Any statement, whether directed to the suspect or not, should be construed as interrogation if it appears to call for a response or is designed to do so. *Id.*

Although the members of the Court expressed extremely divergent opinions regarding the holding in *Innis*[76] and the resultant fate of respondent, the significance[77] of *Innis* lies in the definition given to the term "interrogation."[78] The disagreement[79] between Justices Stewart and Stevens over the precise wording of such a definition is readily understandable because "[a]n exact definition for 'custodial interrogation' is, by its nature, an impossibility."[80]

The Court has wrestled with the meaning of "custody" for years.[81] *Innis,* however, represents its first attempt[82] to precisely define "interrogation." Although the standard enunciated by the Court will undoubtedly provide clearer guidelines for law enforcement agencies and courts to follow,[83] recognition must be made that the definition is, in fact, an *initial* one. In the past, the Court has demonstrated its tendency to "shrink" and "chip away" at *Miranda* and its requirements.[84] It is likely that subsequent decisions interpreting the scope of this definition of "interrogation" will tend to refine and "chip away" at it as well. Until that time, however, *Innis* must be recognized for what it actually is—a decision of first impression, interpreting a material part of a significant doctrine.

---

76. Six of the nine Justices agreed that the officers' conduct resulted in no violation of respondent's constitutional rights, while the remaining three asserted the contrary. 100 S. Ct. 1682 (1980). *See also* note 2 *supra.*

77. The Court specifically stated that certiorari was granted in order to address the meaning of "interrogation" under *Miranda.* 100 S. Ct. at 1687.

78. *See* notes 55, 59 and accompanying text *supra.*

79. *See* notes 73-75 and accompanying text *supra.*

80. United States v. Clark, 425 F.2d 827, 832 (3d Cir. 1970). *See also* United States v. Gibson, 392 F.2d 373 (4th Cir. 1968).

81. *See, e.g.,* Oregon v. Mathison, 429 U.S. 492 (1977) (per curiam) (defendant voluntarily entered police station and answered questions); Beckwith v. United States, 425 U.S. 341 (1976) (defendant questioned in his home); Orozco v. Texas, 394 U.S. 324 (1969) (defendant questioned at his residence); Mathis v. United States, 391 U.S. 1 (1968) (suspect questioned while serving term in prison).

82. *See* notes 8, 47 and 77 *supra.*

83. Miranda v. Arizona, 384 U.S. 436, 442 (1966).

84. *See* Kamisar, *supra* note 46, at 80 n.473.

[casenote by Michael J. Toretti]

LIBEL AND SLANDER—First Amendment Limitations—Business That Advertises Consumer Goods Becomes a Public Figure. *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264 (3d Cir. 1980).

In *Steaks Unlimited, Inc. v. Deaner,*[1] the United States Court of Appeals for the Third Circuit held that a business that conducts an intensive consumer-oriented advertising campaign is a public figure[2] and is required by the First Amendment of the Constitution[3] to prove actual malice in a defamation suit. Though not an "all purpose" public figure, a business becomes a "limited purpose" public figure[4] when it alleges a defamation concerning its product and sales techniques, when it has advertised extensively, and when it has maintained ready access to the media to refute criticism.[5] In light of incomplete and restrictive Supreme Court enunciations of who is a public figure,[6] *Steak's Unlimited, Inc.,* significantly expands the concept to include commercial enterprises that publicize themselves in the course of promoting sales of consumer goods.

Steaks Unlimited, Inc. an Ohio corporation, held a four day steak sale at rented locations in several Pittsburgh area department stores. Although the frozen, chemically tenderized beef was ungraded, it was United States Department of Agriculture (USDA) inspected.[7] To promote the sale, Steaks Unlimited launched a $16,000

1. 623 F.2d 264 (3d Cir. 1980).

2. Persons determined as a matter of law to be "public figures" have a limited legal remedy when defamed: the first amendment protects all commentary on public figures that is not knowingly false or recklessly in disregard of the truth. *See* note 30 and accompanying text *infra.*

3. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

4. Two types of public figures have been recognized by the Supreme Court: the pervasively famous person who in all instances may sue for defamation only as a public figure ("all purpose" public figure), and the private person who asserts himself in the context of a particular public controversy ("limited-purpose" public figure). *See* notes 26-27 and accompanying text *infra. See generally* Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349 (1975).

5. *See* note 33 *infra.*

6. *See* notes 36-38 and accompanying text *infra.*

7. Meat cannot legally be sold in commerce unless it has been government inspected. 21 U.S.C. § 603 (1976). As a selling point, Steaks' salesmen allegedly emphasized to buyers that the beef was "fully government inspected." Such a statement tells very little about the meat's quality, which is described by grading. When interviewed, a local meat market worker stated that "the beef was of 'very poor quality,' possibly the equivalent of utility, canner or cutter, grades of meat inferior to commercial grade." 623 F.2d 264, 267 (3d Cir. 1980).

Commercial beef is graded according to its quality by the United States Department of

advertising campaign consisting of radio and newspaper promotions, large signs at sales locations, and handbill distributions to persons in the vicinity of the stores.[8]

Having noticed the advertisements' omission of prices per pound and USDA grades, WTAE-TV consumer reporter Donna Deaner investigated the sale when her station and the county bureau of consumer affairs received numerous complaints concerning the meat.[9] Deaner's suspicions were heightened by a conversation with a reliable meat market employee[10] and a taped interview with a Steaks' sales agent who made evasive statements about the meat's quality and price.[11] After Deaner reported her investigation to the consumer affairs director of one of the stores hosting the sale, the store decided to terminate its lease agreement with Steaks Unlimited. With the approval of the station's management, Deaner appeared on the local news to report that Steaks Unlimited's promotions were "total misrepresentations," that the quality of meat being sold "would not even be touched" by reputable retailers, and that a host department store had decided to "thoroughly end its endorsement of this big steak sale" because of the reporter's revelations.[12]

Plaintiff's libel[13] action against Deaner, WTAE, and the Hearst

---

Agriculture. The grades, from highest to lowest quality, are as follows: prime, choice, good, standard, commercial, utility, cutter, and canner. For a description of each of the grades, see 7 C.F.R. § 2853.106 (1980).

8. The court referred to the campaign as a "blitz." 623 F.2d 264, 274 (1980).

9. The Allegheny County Bureau of Consumer Affairs was itself unable to investigate the sale because of a lack of resources. The bureau's administrator therefore suggested to Deaner that the station pursue the matter. *Id.* at 267.

10. *See* note 7 *supra.*

11. When asked about the beef's price per pound, the salesman said that "per pound, the prices vary." 623 F.2d 264, 268. In reference to its quality, he asserted the meat was "fully government inspected." *Id. See* note 7 *supra.*

12. The facts indicate that defendants might have convinced a jury that they had correctly asserted the defense of truth. Truth is recognized in Pennsylvania as an affirmative defense. 42 PA. CONS. STAT. ANN. § 8343(b) (Purdon Supp. 1979). *See* Badami v. Dimson, 226 Pa. Super. Ct. 75, 310 A.2d 298 (1973).

Truth is a complete defense to a civil defamation action in all but eleven states, which additionally require that the publication be made with a good motive or a justifiable end. *See generally* A. HANSON, LIBEL AND RELATED TORTS ¶ 98 (1969).

13. Plaintiff alleged libel and slander in the broadcast. Brief for appellant at 1, Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980). Some courts have ruled that all mass media communications should be actionable as libel rather than slander, on the theory that libel is to be applied to forms of communication that hold the greatest potential harm to reputation. *E.g.,* Anderson v. New York Tel. Co., 345 N.Y.S.2d 740 (App. Div. 1973). Some cases have thus treated defamation broadcast over radio or television as libel. *E.g.,* Sorenson v. Wood, 123 Neb. 345, 243 N.W. 82, *app. dismd.,* 290 U.S. 599 (1932).

The majority of cases, however, have applied a questionable technical distinction, in which defamations read from a prepared script are considered libel, but extemporaneous or spontaneous words are treated as slander. *E.g.,* Christy v. Stauffer Publications, Inc., 437 S.W.2d 814 (Tex. 1969). The basis of such an artificial classification is the common-law rule that libel and slander are distinguished by the presence of a writing. *See* Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

The court apparently uses "defamation" and "libel" interchangeably. The Pennsylvania Supreme Court has held that common-law distinctions between the twin torts of libel and

Corporation, which was WTAE's parent company, was heard in the District Court for the Western District of Pennsylvania.[14] The court determined that Pennsylvania law was applicable[15] in addressing the issues of whether the reporter's words were capable of a defamatory meaning and whether the Commonwealth's shield law[16] exempted from discovery certain "outtakes" of filmed interviews used in the report.[17] Federal constitutional principles controlled whether plaintiff meat company was a "public figure" for purposes of the libel suit.[18] The district court granted defendants' motion for summary judgment,[19] determining that Steaks Unlimited could not meet its burden of proving that defendants produced the damaging telecast with knowledge or reckless disregard of the truth.[20] The Third Circuit Court of Appeals affirmed the lower court's decision based upon a policy preference for consumer protection and the Supreme Court's broad guidelines for "public figure" status.

In general, the status of a libel plaintiff as a public figure is a crucial determination because public figures or officials have a judicial remedy only if they can show that they have been defamed maliciously. The Supreme Court held in the landmark case of *New York*

---

slander are not applicable to radio broadcasting. Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963).

One court has referred to a defamation by broadcast as a "defamacast." American Broadcasting, Inc. v. Simpson, 106 Ga. App. 230, 236, 126 S E.2d 873, 879 (1962). *See generally* A. HANSON, LIBEL AND RELATED TORTS ¶ 43 (1969).

14. Initially, the suit was brought in the United States District Court for the Northern District of Ohio with federal jurisdiction based on diversity of citizenship. A change of venue was granted on defendants' motion because the activities had occurred in Pennsylvania, where most of the viewers of the broadcast were located. *See* 28 U.S.C. § 1404(a) (1976).

Steaks Unlimited incorporated and maintained its principal place of business in Ohio. At the time the complaint was filed, Deaner was a Pennsylvania citizen. WTAE-TV is a Pennsylvania corporation and maintains its principal place of business there. Hearst is a Delaware corporation whose principal place of business was New York. 623 F.2d 264, 268 n.4 (3rd Cir. 1980).

15. The determination of applicable law was based on the parties' consensual choice of law. This choice was not challenged by the court, sua sponte, because the state whose law was chosen had some interest in the outcome of the case. The state interest in this case was present because the cause of action arose in Pennsylvania. *See* Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 501 (3d Cir.), *cert. denied,* 439 U.S. 861 (1978).

16. 42 PA. CONS. STAT. ANN. § 5942 (Purdon Supp. 1979). *See* note 65 and accompanying text *infra.*

17. "Outtakes" refers to material filmed or recorded in preparation for a news report, but not included in the actual broadcast. 623 F.2d 264, 277 n.60 (3d Cir. 1980).

18. *Id.* at 271-72.

19. Steaks Unlimited, Inc. v. Deaner, 468 F. Supp. 779 (W.D. Pa. 1979).

20. Courts have noted that summary judgment is especially appropriate in first amendment cases. The District of Columbia Circuit Court has stated that "summary procedures are essential to such litigation, because the fundamental right of free speech is at stake, and the full and free exercise of that right is a primary purpose underlying the *New York Times* principle." Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1966).

The use of summary judgment "prevents all but the strongest libel cases from proceeding to trial, thereby advancing the first amendment policy of shielding the press from harassment." Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947, 954 (D.D.C. 1976). *See generally Role of Summary Judgment in Political Libel Cases,* 52 S. CAL. L. REV. 1783 (1979).

Times, Inc. v. Sullivan[21] that the broad liability allowed in the common-law of libel and slander[22] unconstitutionally impinged upon the first amendment guarantees of freedom of speech and freedom of the press, because the threat of litigation encouraged self-censorship and inhibited open discussion of controversial public matters.[23] The Court, therefore, announced that no public official may recover under any state's defamation law absent a showing "that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of the truth."[24] The same rule was subsequently applied to "public figures,"[25] who are people that achieve general fame or notoriety,[26] or whose activities amount to a thrusting of one's personality into the 'vortex' of an important public controversy.[27]

The broad rationale for limiting the legal recourse of public figures and officials is the guarantee of free and open debate. This rationale theoretically was broad enough to allow the court to similarly limit the recourse of private individuals who complain of publications concerning any "matter of public interest."[28] The Court hesitantly extended the sweep of *New York Times* in the direction of a "matter of public interest" rule over the course of a decade.[29] In *Gertz v. Robert Welch, Inc.*,[30] however, it finally retreated from protecting all comments on "matters of public interest," regardless of the speaker's status. Instead, the present test was developed and based on the firm dichotomy of public figure versus private individual.[31]

---

21. 376 U.S. 254 (1964).

22. Before 1964, the Supreme Court found defamatory statements to be outside the scope of the first amendment. *See, e.g.,* Beauharnais v. Illinois, 343 U.S. 250 (1958). Thus, under the common-law, strict liability attached to all defamatory communications that were not either privileged or true. W. PROSSER, THE LAW OF TORTS § 113 (4th ed. 1971). While this standard of liability effectively safeguarded the reputations of citizens, it also inherently conflicted with the constitutional guarantee of free speech and free press. Recognizing this conflicting consideration, a number of privileges were developed under the common-law to attempt to limit tort liability in the interest of fostering free speech. *Id.* at 819. This condition was extended in a minority of jurisdictions to even false statements of facts concerning officials or public employees. *See* Noel, *Defamation of Public Officers and Candidates,* 49 COL. L. REV. 875 (1949) (listing twenty-six states with the majority view, nine with the minority view). In New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court adopted the minority approach to the privilege. *See* Comment, *A Constitutional Revolution in the Law of Libel: New York Times and Gertz Applied,* 11 TEX. TECH. L. REV. 611 (1979).

23. 376 U.S. 254, 270.

24. *Id.* at 279-80, 285-86.

25. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

26. Generally, the class of "all-purpose" public figures is limited to "household names." *See, e.g.,* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) (William F. Buckley, Jr.); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (Johnny Carson).

27. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

28. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

29. *Id.*

30. 418 U.S. 323 (1974).

31. *Id.* at 343.

The "public figure" standard, which has not proven easy to apply,[32] is based upon two rationales. First, defamed public figures have the remedy of self-help; they have easy access to the news media, which allows them to counterargue or correct errors.[33] Private individuals, on the other hand, do not enjoy easy access to the press and, thus, must rely on the law to protect their names. Second and most important, public figures assume the risk of public comment and criticism by occupying prominent roles in society or by openly asserting themselves to try to influence the outcome of some particular public controversy.[34] Private persons, however, do not open their reputations to public scrutiny and so are more deserving of compensation for their injuries than are public figures.[35]

In *Gertz v. Robert Welch, Inc.*,[36] the Supreme Court purposely settled on an inexact definition of "public figure," intending for courts to subsequently formulate "broad rules of general application" that would accommodate the competing interests of press and personal reputation.[37] The Supreme Court since then has been slow to find such formulations satisfactory, and has employed a narrow approach to overturn three circuits' characterizations of libel plaintiffs as public figures.[38] Yet the purpose of the *New York Times* rule emphasizes the necessity for courts to "articulate clear standards that can guide both the press and the public."[39] Persons (notably the press) who are uncertain of the scope of their right to speak out will

32. *See* Waldbaum v. Fairchild Publications, Inc. 627 F.2d 1287 (D.C. Cir. 1980).

33. The Supreme Court acknowledges that "the truth rarely catches up with a lie," but has stated that simply because the self-help remedy "is inadequate to its task does not mean that it is irrelevant." Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974).

34. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979).

35. *Id.* at 164.

36. 418 U.S. 323 (1974).

37. *Id.* at 343-44. *Cf.* Waldbaum v. Fairchild Publications, Inc. 627 F.2d 1287 (D.C. Cir. 1980) (establishing a "reasonable person's understanding" rule for identifying public figures).

38. Wolston v. Reader's Digest, Inc., 443 U.S. 157 (1979) (plaintiff cited for contempt by federal grand jury sixteen years prior to attack on same subject held to be a private figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (researcher who received federal funds held to be a private figure in his suit against a senator who criticized the researchers work); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (wife of industrialist not made a public figure as a result of her highly publicized divorce because she did not "freely choose to publicize issues as to the propriety of her married life").

39. Waldbaum v. Fairchild Publications, Inc. 627 F.2d 1287, 1292 (D.C. Cir. 1980). The *Waldbaum* court discussed the importance of clearly identifying the class of "public figure," both for the press and for the public. With an uncertain standard governing future litigation, many members of the press will likely choose to "err on the side of suppression." *Id.* at 1293.

Members of the general public, each a possible subject of press defamation, may be deterred from involvement in public affairs because it could not be predicted whether such conduct would carry with it "limited purpose public figure" status, and a lack of remedy for injury to reputation. Democratic government has always encouraged citizen involvement in public affairs, but suppression is fostered when vague rules govern the potential consequences of an individual's participation in public life. Clear rules will allow a private person contemplating public involvement to accurately foresee the effect of that involvement on his legal status, if he is consequently defamed by the press. *Id.*. *See generally* Dale and Dale, *Full Court Press: The Imperial Judiciary vs. The Paranoid Press,* 7 PEPPERDINE L. REV. 241 (1980).

hesitate to do so, fearing the impending possibility of a defamation suit.[40] The lack of specific guidelines for identifying a public figure resulted in a "difficult constitutional question" for the Third Circuit in *Steaks*.[41]

Under Pennsylvania law, a libel action requires proof of the following elements, the burden of which is on the plaintiff.[42] First, the published words must be defamatory in nature and must be understood as being defamatory by their recipient.[43] Second, the defamatory words must be communicated intentionally or without just cause or excuse.[44] Two affirmative defenses against a libel action are truth and privilege based on public policy.[45] Analytical difficulties have been encountered in past judicial attempts to mesh common-law precedent, developed under the state's formulation, with modern first amendment requirements.[46]

The *Steaks* court acknowledged these past analytical difficulties, but found that the essential determination of a defamation case under Pennsylvania law need involve only the following two principal inquiries: first, whether the plaintiff harmed the defendant's reputation within the meaning of state law; and second, if so, whether the first amendment nevertheless precludes recovery.[47] The *Steaks* court in effect replaced the state tort law provisions for intent and policy with the constitutional issues drawn by *New York Times* and its progeny.[48]

---

40. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). A survey of case law reveals that the vast majority of libel defendants are members of the press. The *Steaks* court noted the strength of the deterrent value of libel litigation on the press because of its excessive cost. 623 F.2d 264, 280 n.76 (3d Cir. 1980). Five years ago, the minimum cost of defending a "full-fledged libel suit" was estimated at $20,000.00. Anderson, *Libel and Press-Self-Censorship,* 53 TEX. L. REV. 422, 435-36 (1975). The defense of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), cost nearly $100,000.00. *Id.* In Sprouse v. Clay Communication, Inc., 418 W. Va. 590, 211 S.E.2d 674, *cert. denied*, 423 U.S. 882 (1975), the West Virginia Supreme Court of Appeals noted that in its state, "where a large portion of the State is served by newspapers which lack substantial financial assets, the threat of potential libel actions becomes repressive, not only because of possible judgments but also because of the inordinate legal expenses normally incurred in defending a protracted libel suit." *Id.* at 605, 211 S.E.2d at 690-91. *See* 623 F.2d 264, 280 n.76 (3d Cir. 1980)

41. *See* note 39 *supra.*

42. 42 PA. CONS. STAT. ANN. § 8343(a) (Purdon Supp. 1979).

Dictum of the *Steaks* court questioned the constitutionality, in light of recent Supreme Court rulings, of Pennsylvania's placement of the burden of proving truth on the defendant. 623 F.2d 264, 274 n.49 (1980). *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 n.10 (rejecting Justice White's opinion that it would be constitutional to require libel defendants to prove the truth of allegedly defamatory statements). New York Times, Inc. v. Sullivan, 376 U.S. 254, 271 (noting that tests that put the burden of proving truth on the speaker are consistently rejected as being inconsistent with first amendment guarantees).

43. Corabi v. Curtis Publishing Co., 441 Pa. 432, 441-42, 273 A.2d 899, 904 (1971).

44. *Id.* at 451, 273 A.2d at 909.

45. 623 F.2d 264, 270 (3d Cir. 1980).

46. 623 F.2d 264, 271 (3d Cir. 1980). For a general discussion of the analytical difficulties encountered when applying first amendment principles to state tort law formulations see Wade, *The Communicative Torts and the First Amendment,* 48 MISS. L.J. 671 (1976)

47. 623 F.2d at 270.

48. *Id.* at 271-72.

The initial issue considered by the *Steaks* court was whether or not the reported words were capable of a defamatory meaning, under the Commonwealth's law. Defamation has been defined by the Pennsylvania Supreme Court as a communication that sufficiently harms the reputation of another so as "to lower him in the eyes of the community or to deter third persons from associating or dealing with him."[49] Telecast statements that an enterprise was engaged in "total misrepresentation" were found by the *Steaks* court to satisfy this definition because of the statements' potential threat to the enterprise's commercial dealings.[50] Once a communication is determined to be defamatory under Pennsylvania law, the intent necessary to complete the cause of action is presumed to exist. The presumption may be rebutted, however, by a defense of privilege based on public policy.[51] The *Steaks* Court interpreted treatment of prima facie defamatory statements as depending upon the Supreme Court led evolution of "first amendment libel law."[52]

Examining the multi-jurisdictional evolution of the law of libel within the confines of the first amendment, which focuses on the plaintiff's status as a public figure or official, the court found that public figure plaintiffs must prove "with convincing clarity" that the defendants published false material with knowledge of its falsity or with reckless disregard of the truth.[53] To determine whether the plaintiff was a public or private figure in *Steaks*, the court fundamentally relied on the broad principles adopted by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*[54] Both sides conceded that Steaks Unlimited was not an "all purpose" public figure, but disputed whether the company was a "limited purpose" public figure as a result of having "thrust themselves to the forefront" of a particular public controversy in order to influence the controversy's outcome.[55]

The *Steaks* court found that plaintiff possessed both of the characteristics of a limited purpose public figure. Steaks Unlimited's intensive advertising campaign demonstrated regular and continuing access to the media, absent evidence that further rebuttal advertise-

---

49. *Id.* at 270, *quoting*, Corabi v. Curtis Publishing Co., 441 Pa. 432, 449-50, 273 A.2d 889, 908-09 (1971).

50. *Id.* at 271. The court must decide whether the words complained of could be defamatory as a matter of law, before a jury determines how the words were actually understood. Despite strong evidence that the published words were understood to be defamatory, the *Steaks* court found that the matter of how the words were actually understood remained the subject of a jury determination, should the summary judgment be disallowed. *See id.* at 271.

51. 623 F.2d 264, 271 (3d Cir. 1980).

52. *See* notes 45-47 and accompanying text *supra.*

53. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

54. 418 U.S. 323 (1974).

55. *Id.* at 345.

ments would have been refused or unaffordable.[56] The court took a novel perspective[57] in holding that commercial advertising fulfills the "media access" requirement but did not specify whether it referred only to those who regularly advertise before the alleged defamation is made, or instead to all libel plaintiffs who have the means to "advertise" a rebuttal.[58]

The more important trait of a voluntary assumption of the risk of injury from defamation, was also found in plaintiff's advertising campaign, primarily because it was aimed at the public's consumer interests. The court emphasized the increasingly evident public policy favoring the promotion of consumer interest and awareness, for which free dissemination of information to the public without fear of civil liability for minor inaccuracies in reporting is essential.[59]

Only those commercial advertisers, whose advertising of consumer goods creates a controversy surrounding their quality, should

---

56. 623 F.2d at 274.

57. Plaintiff contended, "Public figures are sought out for their opinions and reactions. Private individuals must pay to advertise." Brief for appellant at 12, Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980).

58. The obvious undesirability of advertising one's product as "not of poor quality" to refute alleged defamations emphasizes the limited effectiveness of the self-help remedy and suggests it may be even more limited for commercial enterprises. *See* note 34 *supra.*

In the same vein, the *Steaks* court declined to rule on defendants' contention that plaintiff should be considered a public figure simply because it is a corporation. 623 F.2d 264, 274 n.47 (3d Cir. 1980). The District of Columbia District Court has recognized an inherent distinction between the state's interest in protecting private persons as opposed to corporations.

That court found it readily apparent that the reputational interests the Supreme Court has found most compelling "are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the Court [has] sought to protect." Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947, 955 (D.D.C. 1976).

The District of Columbia court therefore stated that corporations can be sufficiently protected by a rule that the malice standard applies only when issues of legitimate public concern are discussed. The rule that alleged defamations regarding "matters of public concern" require any plaintiff, public or private, to prove malice, has been discredited for at least noncorporate plaintiffs by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The court's approach grants some deference to the values underlying corporate libel actions developed under state law, while at the same time purporting to result in only a minor infringement on the first amendment and to defend the market place of ideas. 417 F. Supp. at 956.

An opposite view was recently taken in Vegod Corp. v. American Broadcasting Co., Inc., 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979), *cert. denied*, 49 U.S.L.W. 3234 (October 6, 1980):

> [T]here is no distinction between the protectible interest in reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages. . . . While it is true that the Supreme Court's opinions in these cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defamation claims, the distinction between corporations and individuals is one without a difference.

Id. at 767, 603 P.2d at 18-19, 160 Cal. Rptr. at 103, *quoting,* Trans World Accounts, Inc v. Associated Press, 425 F. Supp. 814, 819 (N.D. Cal. 1977). *See* 623 F.2d 264, 274 n.47 (1980).

59. 623 F.2d at 280.

face a limited legal remedy against their critics.[60] In *Hutchinson v. Proxmire*[61] and *Wolston v. Reader's Digest, Inc.*,[62] the Supreme Court narrowed "public figure" to exclude plaintiffs who have been injected into the public eye through force, circumstance, or solely through the acts of the defendant. The *Steaks* court found that this was not at issue because plaintiff did not dispute defendant's contention that its actions were in response to the controversy existing when consumers began complaining about the sale.[63] Because plaintiff as a public figure presented insufficient evidence to contradict numerous affidavits supporting defendant's belief in the truthfulness of the report, there remained no triable question of fact concerning defendants' disregard for the truth.[64]

The final issue addressed by the court was plaintiff's contention that Pennsylvania's shield law[65] does not prevent discovery of "outtakes"[66] from filmed interviews used in an allegedly defamatory report. The shield law prohibits discovery of confidential media news sources in civil or criminal litigation in order to allow the press access to "willing-if-anonymous" sources.[67] The statute has been interpreted broadly by Pennsylvania courts because the legislative policy of protecting news sources is of greater importance than the disclosure of potential evidence in any legal proceeding.[68] All sources of information are protected, including personal identities, documents, and recordings.[69] Plaintiff's contention that the primary source of the outtakes was already known did not remove the shield law's protection, because the identity of secondary sources might have been revealed by the outtakes nonetheless.[70] The court thus found it appropriate to apply the general Pennsylvania rule that all nonpub-

60. *Id.* at 280. *But cf.* Vegod Corp. v. Am. Broadcasting Co., Inc., 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979) (advertising and "going-out-of-business" sale does not make retail seller a public figure), *cert. denied,* 49 U.S.L.W. 3234 (October 6, 1980).

61. 443 U.S. 111 (1979).

62. 443 U.S. 157 (1979).

63. 623 F.2d at 280. *See* Comment, *Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media,* 48 U. CIN. L. REV 1027 (1979). One of the underlying requirements for obtaining and retaining a Federal Communication Commission License to broadcast is that the licensee serve the "public convenience interest, and necessity." 47 U.S.C. § 307 (1976).

64. 623 F.2d at 276-77.

65. 42 PA. CONST. STAT. ANN. § 5942 (Purdon Supp. 1979).

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such persons, in any legal proceeding, trial or investigation before any government unit.

Id. § 5942(a).

66. *See* note 17 *supra.*

67. *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

68. *Id.* at 42, 193 A.2d at 185-86.

69. *Id.* at 40, 193 A.2d at 185-86.

70. 623 F.2d 264, 279 (3d Cir. 1980).

lished portions of a source's statements are protected, regardless of whether the source's identity is already known.[71]

Steaks Unlimited Inc. v. Deaner represents a significant attempt by the Third Circuit to provide one "workable principle of broad application" by which the elusive but crucial determination of public figure status will be facilitated in libel and slander cases. A seller that through advertising seeks the public's attention in order to influence consumer choice is a public figure. Unless the Supreme Court chooses to further narrow the scope of the public figure category,[72] first amendment protection from civil liability for defamation is assured, at least within the Third Circuit, to all reporters or advocates who do not knowingly lie or recklessly disregard the truth in attempting to expose consumer frauds.

71. Hepps v. Philadelphia Newspapers, Inc., 3 Pa. D & C.3d 693 (C.P. Alleg. County 1977).

72. Appellee Steaks Unlimited, Inc. is not likely to ask for certiorari because, according to its counsel, it has "run out of money to maintain further legal action." Nat'l L.J. May 12, 1980, at 5, col. 1. *See* note 40 *supra.* In addition, the Supreme Court has denied certiorari of a case presenting the public figure issue with similar facts. Vesgood Corp. v. American Broadcasting Co., 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979), *cert. denied,* 49 U.S. U.S.L.W. 3234 (October 6, 1980). *See* note 60 *supra.*
[Casenote by David J. Parsells]